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80-1733

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

JOHN P. OHL,

Petitioner,

v.

LILLIAN M. OHL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL, OF FLORIDA

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QUESTIONS PRESENTED

1. Did the Florida courts, in making a property award as part of a divorce decree, deny to Petitioner (Husband) the due process of law guaranteed by the Constitution's Fourteenth Amendment, as construed in such cases as *In re Marriage of Roesch,* 83 Cal. App. 3d 96, 147 Cal. Rptr. 586 (1st Dist. 1978), by granting to Wife, a resident of a foreign country and a person of substantial means found to be without "need", an interest in real and personal property located in the State of New York which the Husband had acquired and owned for some 30 years, as his sole property in that State?

2. Did the Florida courts, by awarding as part of a divorce decree, attorney's fees to a Wife whom the Florida courts had found to be without need, make a sexually discriminatory award which denied to Petitioner (Husband) equal protection of the laws under the Fourteenth Amendment as construed in *Orr* v. *Orr,* 440 U. S. 268 (1979); *Childs* v. *Childs,* 440 U. S. 952 (1979); and *Loyacano* v. *Le Blanc,* 440 U. S. 952 (1979)?

3. Did the Florida courts deny to Petitioner (Husband) his right, granted by the Fourth and Fourteenth Amendments of the Constitution, to be "secure" in his "papers and effects", by permitting the Wife to enter into evidence at a divorce trial documents which she had stolen from him?

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No.

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JOHN P. OHL,

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PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL, OF FLORIDA

Petitioner JOHN P. OHL respectfully prays that a writ of certiorari issue to review a decision of the Fourth District Court of Appeal of Florida which affirmed, *per curiam*, without opinion (13a)* a Final Judgment of Dissolution of Marriage entered by the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County on August 20, 1979 (1a-12a).

The trial court's Final Judgment granted petitioner a divorce from his wife (10a), found that she "ha[d] no 'need' " and denied her alimony in any form, and denied her "a special equity or any valid claim in or to the husband's Palm Beach, Florida home" (4a). The decree, nevertheless, granted the wife a 40% interest in two parcels of residential real estate, the former marital home, owned by petitioner in the State of New York (8a-9a), granted the wife a 50% interest in furnishings and other personalty owned by petitioner and acquired for use and located in the New York

* "__a" refers to pages of the appendix of decisions below which appears following the text of this petition.

residences (9a), and directed husband to pay $21,500 of the wife's counsel fees and costs (13a).

Each of these awards against petitioner involved violations of the Fourteenth Amendment to the federal Constitution. They raise, we submit, significant questions about how the protections of that amendment are to be applied to divorcing spouses who, by the time of their divorce, both have moved from their original State of marital domicile.

The Fourth District Court of Appeal denied rehearing to its affirmance of the trial court on January 16, 1981 (37a).

OPINIONS BELOW

The trial court's Final Judgment of Dissolution of Marriage ("the Judgment") dated August 20, 1979 appears in the appendix at pp. 1a-12a. Its further order with respect to attorneys' fees, dated September 12, 1979, appears at pp. 13a-14a. Both sides appealed. Florida's Fourth District Court of Appeal, affirmed in a *per curiam* order dated December 10, 1980, which appears at pp. 15a. The latter court also denied on January 16, 1981, again without opinion, the petitions of both parties for rehearing. This ruling is set forth at p. 37a.

On February 25, 1981, the Supreme Court of Florida rejected, for want of jurisdiction (44a), a petition by the present petitioner seeking to invoke the discretionary jurisdiction of that court (39a). None of the foregoing decisions has been reported.

JURISDICTION

The decision of Florida's Fourth District Court of Appeal affirming, without opinion, the Final Judgment of the trial court was entered on December 10, 1980 (15a), and the Court of Appeal's decision denying rehearing was entered on January 16, 1981 (37a). That court is the highest court of Florida in which review could be had by reason of the further ruling of the Supreme Court of Florida, entered February 27, 1981, holding that it lacked jurisdiction to review. This Court's jurisdiction is invoked pursuant to 28 U. S. C. 1257(3)(1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition invokes Section 1 of the Fourteenth Amendment of the Constitution of the United States, the Fourth Amendment which is made applicable to the States by the Fourteenth Amendment, and various provisions of the statutes of Florida relating to divorce. They are reproduced in a statutory appendix at the back of this volume.

STATEMENT OF THE CASE

Petitioner and respondent ("Husband" and "Wife", respectively) married in 1932, lived all their married lives in the State of New York, and separated in 1968. Both continued to reside in New York until 1975-1976, when the Wife moved to the Cayman Islands, a British colony in the Caribbean, and the Husband to Florida (3a-4a). At the time of the final trial hearing in the Florida divorce proceedings the parties had been separated for over 10 years, during which time the Wife had supported herself, in full, from her substantial independent means (3a). Both Husband and Wife were 70 years of age. The four children born of their marriage all were adults with their own independent means (2a).

More than two years after taking up domicile in Florida, the Husband filed in the courts of that State for dissolution of the marriage. The Wife appeared and was represented by counsel throughout the ensuing proceedings (1a). At the time Husband initiated his action for divorce, his property included residential realty in Nassau County, New York, which he had purchased and owned for over 30 years, and which, at one time, had served as the parties' marital home (4a). His property included, as well, various items of antique furniture and art intended for use in, and used in, the New York residence, which he had bought and paid for, from time to time, during the marriage (20a).

The divorce requested by petitioner was granted under Florida's "no-fault" divorce statute, Fla. Stat. Ann. § 61.001 *et seq.*, (West 1969 & Supp. 1981), because, the trial court found, "the marriage is irrevocably broken" (10a). At the time of dissolu-

tion, the Wife had a net worth in excess of $2,000,000 (19a) and the Husband a net worth of over $1,000,000 (21a). The Wife testified at trial that she had "no need" (19a), and the trial court specifically so found (4a).

The Wife, nevertheless claimed and was granted a "special equity" (*i.e.*, a property interest) in Husband's New York realty and furnishings and art objects, notwithstanding the fact she admitted that she had no proof to support any "special equity."* Prior to the trial, the Husband filed a Motion in Limine to preclude the Wife from using at the trial confidential private documents which she had stolen from him which purported to support a claim to a "special equity". The Motion was held in abeyance until the time of the trial on the representation of Wife's counsel that the information might not be used. Notwithstanding, the documents were offered at the end of the trial, and the trial court received the documents into evidence. They are the only evidence upon which an award to the Wife of a "special equity" in the New York realty can be predicated.**

The Wife also claimed an interest in the many antiques and works of art which the Husband had purchased, and paid for, for use in the couple's one-time Long Island home. She acknowledged that she had not contributed any monies toward their purchase, but nevertheless, the trial court awarded one-half to the Wife (9a).***

In the face of its finding that the Wife, by reason of her concession and substantial wealth, had no "need", the trial court

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* "The term 'special equity' was created (in the law of Florida) to describe a vested interest in property brought into the marriage or acquired during the marriage. . . . This vested interest is *not* alimony." *Canakaris* v. *Canakaris,* 382 So.2d 1197, 1200 (Fla. 1980) (emphasis in original).

** The documents properly construed do not create an interest in the Wife—a moot point if they are properly excluded.

*** The trial court found that the Wife had purchased other items of furniture. These were awarded to the Wife, and objection to that award was raised here.

also awarded the Wife $21,500 in attorney's fees and costs (14a). Under the governing Florida divorce statute, Fla. Stat. Ann. §§ 61.16 (West Supp. 1981), which is, on its face, gender neutral, an award of attorney's fees to a "party" must be based upon a finding as to that party's "need". Under such circumstances, the attorney's fee award in this case was sex based, a grant to the Wife because she is a woman. She was entitled, in the Florida court's view, to a stereotyped award of the kind which, in the past, routinely had been granted to wives in divorce proceedings by reason of their sex alone.

There is, we submit, no warrant in the Fourteenth Amendment for requiring a husband to pay a wife's attorney's fees in a divorce action when she is fully able to bear them herself and when, as here, they were occasioned, not by her need to pursue protection from post-marital need, but simply to wage a struggle to augment her already substantial personal wealth.

The objection to the use of the stolen papers on federal constitutional grounds was raised by pre-trial motion (25a-26a). The other federal constitutional issues presented herein arose out of the trial court's judgment and were presented in petitioner's applications addressed to the Fourth District Court of Appeals (28a, 33a, 35a) and the Petition to Invoke Discretionary Jurisdiction to the Florida Supreme Court (40a-43a).

REASONS FOR GRANTING THE WRIT

By making in the face of petitioner's Fourteenth Amendment claims, the awards to the Wife here challenged, Florida's Fourth District Court of Appeal has decided important questions of due process and equal protection regarding the property rights of parties to a marriage in which both divorcing parties have moved from the State of original marital domicile. Marital dissolutions of this kind are becoming an increasingly frequent phenomenon in this country. Review is required to bring the Florida Courts into line with recent decisions of this Court and to establish authoritative guidelines for the resolution of situations which are arising regularly in domestic relations jurisprudence across the United States.

(1) A change of domicile by one or both spouses from one State to another State (or, as here, to a foreign country) should not affect or change the character of property acquired by either party prior thereto. Once an individual's rights in property becomes fixed by the laws of the State in which the property was acquired and located, that person is denied due process if those rights can be altered by reason of a divorce decree of a court of another State.

A case addressing the constitutional issue here raised is *In re Marriage of Roesch,* 83 Cal. App. 3d 96, 147 Cal. Rptr. 586, (1st Dist. 1978), involving parties who had lived in Pennsylvania during coverture. When the parties later separated, the husband moved to California, a community-property State. Under Pennsylvania law, certain assets which the husband had acquired during the marriage and while he lived in Pennsylvania were his separate property. Applying California's community-property law, the trial court held that all of the parties' property must be equally divided.

The California appellate court reversed, holding that property acquired by a spouse during the marriage while domiciled in one State could not lose its character as the separate property of that spouse upon a change of domicile to a State which would allow the non-acquiring spouse an interest in the property. The appellate court held that a change in the character of the property could not constitutionally be applied retroactively to impair "vested interests" unless both parties had changed their domicile to California and sought divorce there.

Unless both these conditions exist, the interest of the State of removal in the status of the property is insufficient to justify reclassification without violating the due process clause of the Fourteenth Amendment and the privileges and immunities clause of Article IV, Section 2 of the federal Constitution. Additionally, reclassification based upon a mere change of domicile would abridge the privileges and immunities clause of the Fourteenth Amendment.

Many additional cases to the same effect are collected in Annot., Change of Domicile as Affecting Character of Property Acquired as Separate or Community Property, 14 ALR 3d 404 (1967). For example, in *John* v. *Commissioner,* 88 F.2d 952 (8th Cir. 1937), *on appeal after remand,* 105 F.2d 454 (8th Cir. 1939), *cert. denied,* 308 U.S. 625 (1940), it was held property did not lose its character as community property when removed to a common-law State.

In the present case, only petitioner moved to Florida. Mrs. Ohl moved to the foreign jurisdiction of the Cayman Islands. Accordingly, Florida did not have the requisite interest required to assert over the property the jurisdiction that its courts did. Equal protection of the law cannot exist because the Florida Courts have no jurisdiction (are without power) over the Wife's Cayman Island properties (real and personal).

As to the realty involved in this case, New York was a so-called "title" state. The title to the realty in which a Flordia court awarded Mrs. Ohl a "special equity" had been solely her husband's for 30 years. Under New York law the realty, being titled in Mr. Ohl, belonged to him. And before the parties departed from New York the Wife's rights were barred. *Scheurer* v. *Scheurer,* 308 N.Y. 447, 126 N.E.2d 555 (1955).

Similarly, under New York law, if personal property (here household furnishings and art works) had been paid for by the husband, the fact that the wife participated in selection of such property and that the property was intended to be, and was, used by the couple in their family home, does not give rise to a joint ownership which entitles the Wife, upon dissolution of the marriage, to an undivided one-half interest in the property. *Manheim* v. *Manheim,* 60 Misc. 2d 88, 302 N.Y.S. 2d 473 (Sup. Ct. Nassau Co. 1969), *aff'd mem.,* 310 N.Y.S. 2d 1017 (2d Dep't 1970). That case specifically held that mere common possession of marital property would not result in joint ownership. To the same effect is *Kroul* v. *Kroul,* 42 A.D. 2d 584, 344 N.Y.S. 2d 702 (2d Dep't 1973) (mem.).

In the present case, the Florida courts had no jurisdiction to transfer to the Wife the Husband's property (real or personal) which he had acquired in New York and owned it under New York law before he changed his domicile to Florida. *See, e.g., New Jersey* v. *Moriarity,* 268 F.Supp. 546 (D.N.J. 1967). While we recognize that the Florida court had jurisdiction to award alimony, and might have made orders for the disposition of the petitioner's property to satisfy such an award, the Florida courts explicitly found that they had no basis for making such an award in this case. The decretal provisions in issue can be explained only as an attempted assertion by the Florida court of an *in rem* jurisdiction over the marital parties' property wherever situated. Such an assertion cannot, we submit, be squared with the fundamental assumptions of our federalism. This Court should decide, we submit, whether this assault is permissible under the Fourteenth Amendment.

(2) The Florida courts' award of attorney's fees to the Wife cannot be reconciled with *Orr* v. *Orr,* 440 U.S. 268 (1979); *Childs* v. *Childs,* 440 U.S. 952 (1979); or *Loyacano* v. *Le Blanc,* 440 U.S. 952 (1979). *Orr* held unconstitutional the Alabama statute providing that the wife (but not the husband) could be awarded attorney's fees. *Childs* and *Loyacano* held to the same effect as to the divorce statutes of New York and Louisiana, respectively.

Unlike the statutes at issue in those cases, the relevant Florida statute, Fla. Stat. Ann. § 61.16, is, in terms, gender neutral since it provides that "a party" may be ordered to pay the other spouse's attorney's fees and costs upon a showing of need. *See also Turner* v. *Turner,* 383 So.2d 700 (Fla. 4th Dist. Ct. App. 1980). But, on the found facts of the present case, the Florida enactment plainly has been applied in a sexually discriminatory and unconstitutional way. The Wife's net worth exceeds two million dollars (19a), her U.S. income tax return for one year alone (1970) showed a taxable income of $190,720. She admitted and the trial court found "no need". The Florida court's

order to the Husband to pay $21,500 to the Wife as attorney's fees and costs is an exercise in judicial "chivalry" which, this Court's holdings make clear, the Florida courts cannot constitutionally indulge at petitioner's expense.

(3) The Florida courts permitted the Wife's use as evidence at trial of "papers" (documents) stolen by the Wife in New York and taken to Florida for use in the Florida divorce proceedings (26a). This, we submit, denied the Husband his rights guaranteed by the Fourth and Fourteenth Amendments, to be secure against the seizure of his "papers and effects" which the Constitution decrees "shall not be violated".

This case frames, clearly, a question significant to Fourth Amendment jurisprudence which this Court now should address, *viz.*, whether the exclusionary rule of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), should be applied to civil, as well, as criminal proceedings? While many courts have suggested that the answer to this question is "no", others, recognizing the broad scope of this fundamental right of all citizens, have taken a contrary view. *See, e.g., Williams* v. *Williams*, 8 Ohio Misc. 156, 221 N.E.2d 622 (Ohio Common Pleas 1966), *Kohn* v. *Superior Court*, 55 P.2d 1186 (Cal. App. 1936).

In *Mapp*, 367 U.S. at 655 the Court observed:

> "Only last year the Court itself recognized that the purpose of the exclusionary rule is to deter—to compel respect for the Constitutional guaranty in the only effective available way—by removing the incentive to disregard it. *Elkins* v. *United States, supra*, 364 U.S. at p. 217, 80 S.Ct. at p. 1445."

In *United States* v. *Janis*, 428 U. S. 433 (1976), a divided Court recognized the disparity of views concerning the exclusionary rule and termed the continuing debate surrounding it a "warm one". (*Id.* at 446.) The instant case provides a vehicle for the resolution of this important issue.

CONCLUSION

This case poses issues which are of growing importance to American jurisprudence as the number of divorces rises and as the citizens of an increasingly mobile society move, ever more frequently, from one State to another. The writ should issue so that this Court may address and decide them.

Respectfully submitted,

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April 16, 1981

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* The "societal costs" imposed by exclusion are not present in this, a divorce case. (428 U. S. at 454.)

Decision Below

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FINAL JUDGMENT OF DISSOLUTION

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO. 78 1441 CA (D) 03 G

IN RE: THE MARRIAGE OF

JOHN P. OHL,

Husband,

and

LILLIAN M. OHL,

Wife.

_____/

FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE

This matter was tried upon the husband's petition for dissolution of marriage and the wife's answer and counterclaim. The parties appeared with counsel. The court heard testimony of the parties and their witnesses, and, having considered the evidence, testimony and memoranda of counsel, finds as follows:

A. This court has jurisdiction over the subject matter and the parties. The court finds the marriage is irretrievably broken.

B. The parties were married in 1932. They have been separated for the past ten (10) years, and each has lived upon his or her separate resources for the entire period of the separation. Neither has requested financial assistance from the other during this separation.

C. The parties had four (4) children, all of whom are now adults. The wife was a full-time homemaker and cared for the children until approximately 1967, when the youngest of the children reached 21 years. During the marriage before the separation, the wife made contributions to the husband's career by entertaining his partners, associates and

clients, and by participating in charitable affairs.

D. The husband was, and is, a successful attorney, which enabled the family to enjoy a relatively high standard of living. The husband resigned from active practice in 1975, due partially to poor health. The wife has enjoyed relatively good health during the entire period of the marriage including the separation.

E. During the long-term separation, the wife lived comfortably upon income derived from her own assets and from income derived through a vested life estate in two substantial trusts. She has, without financial assistance from her husband, bought land and built a home in the Cayman Islands valued at $185,000 and purchased a valuable yacht. While the husband has the ability to pay a reason-

able award of alimony, the court finds the wife has no "need" for such an award. The court, after consideration of the criteria in F.S. 61.08 as amended, concludes the wife's failure and ability to demonstrate need (along with her admission of no need) require the court deny her claim for alimony in any form.

F. The wife failed to establish a special equity or any valid claim in or to the husband's Palm Beach, Florida home nor his interest in the Paradise Ranch, Limited partnership. The husband holds record title in his sole name to a residence and adjoining acreage in Sands Point, Town of Hempstead, County of Nassau, in the State of New York:

> BEGINNING at a point in the center line of a certain private right of way which extends westerly from the lane dividing

the property of the North Shore-Sands Point Corporation from the property of Daniel Guggenheim, which land leads northerly from the Middle Neck Road; which said point of beginning is distant westerly 311.51 feet measured along the center line of said right of way from the intersection of the center line of said right of way with the center line of said lane and which point of intersection is distant 1812.93 feet northerly from the Middle Neck Road as measured along the center line of said lane; running thence south 17 degrees 25 minutes west 677.21 feet; thence north 74 degrees 46 minutes 25 seconds west, 325 feet; thence north 15 degrees

25 minutes east 626.67 feet to the center line of the aforesaid right of way; thence south 87 degrees 37 minutes 01 seconds east along the center line of said right of way, 191.64 feet to a point of curve in said center line; thence southerly still along said center line on a curve with a radius of 457.264 feet a distance of 162.99 feet to the point or place of beginning.

and adjoining acreage legally described as:

BEGINNING at a point in the center line of a certain road or lane leading northerly between the premises herein described and other premises now or formerly of Daniel Guggen-

heim on the east, from the highway leading from Sands Point to Roslyn, now known as Middle Neck Road, said point being distant 1171.53 feet from said Middle Neck Road, as measured along said line of said lane; running thence north 28 degrees 30 minutes 2 seconds east 45.02 feet; thence north 31 degrees 45 minutes 52 second east, 93.76 feet; thence north 22 degrees 12 minutes east 324.12 feet; thence north 12 degrees 41 minutes 16 seconds west 131.75 feet; thence north 43 degrees 37 minutes 40 seconds west, 46.75 feet to the center line of a certain other road or lane leading westerly between premises herein described and other premises on

the north, which prior to May 12, 1932, belonged to North Shore-Sands Point Corporation, the preceding five (5) courses being along the center line of said first mentioned lane; thence north 58 degrees 51 minutes 49 seconds west along the center line of said last mentioned road, 245.03 feet; thence still along said center line on a curve the radius of which is 457.26 feet, 66.48 feet to a point; thence south 17 degrees 25 minutes west 677.21 feet; thence south 74 degrees 46 minutes 25 seconds east, 351.88 feet to the point or place of beginning.

The court finds the wife is clearly and convincingly entitled to a special equity

of 40% in the Sands Point residence and adjoining acreage.

G. The wife is not entitled to a further accounting from the husband as requested by her counterclaim.

H. The parties own valuable antiques and furnishings in the Sands Point, New York residence and in storage, the bulk of which are scheduled on an appraisal submitted into evidence. The court finds the wife owns individually those items circled on the appraisal, and the remainder belong to the parties jointly. The parties shall divide the joint property, if they can, in whole or in part, between themselves. The remaining part shall be sold within a reasonable time and the net proceeds divided equally between the parties. Any personal property not included in the appraisal belongs to the party who acquired it.

It is therefore ORDERED AND ADJUDGED:

1. The bonds of matrimony between the parties are dissolved because the marriage is irretrievably broken.

2. The wife's prayer for alimony is denied.

3. The wife's prayer for an accounting is denied.

4. The wife's claim for a special equity in the husband's Palm Beach, Florida home is denied as is any claim to the husband's interest in the Paradise Ranch Limited partnership.

5. The wife's claim for a special equity in the Sands Point, New York property is granted, and she is hereby awarded a 40% undivided interest in the Sands Point, New York property as previ-

ously described in this judgment. From July 1, 1979, the wife shall be responsible for payment of 40% of the operating expenses for this property.

6. The wife owns individually and is entitled to all of the circled items on the appraisal of the parties' furnishings and contents. The parties shall own jointly all items of personal property on the appriasal not circled. The parties are directed to divide these items to their mutual satisfaction within forty-five (45) days from the date of this judgment. If not, the remaining items shall be sold at public or private sale, and the net proceeds equally divided.

7. The court reserves jurisdiction for the purpose of considering the wife's attorney's fees and costs, if any, after motion with notice.

8. The court reserves jurisdiction to enforce this judgment, and the parties are directed to take such action as is reasonable and necessary to carry out the intent and purpose of this judgment.

DONE AND ORDERED at West Palm Beach, Florida, this 20th day of August, 1979.

Thomas E. Sholts,
Circuit Judge

Copy furnished:

Paxton, Crow, Taplin
& Bragg, P. A.

O'Connell & Cooper

ORDER ASSESSING ATTORNEYS' FEES AND COSTS

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

JUVENILE AND FAMILY DIVISION
CASE NO. 78 1441 CA (D) 03 G

IN RE: THE MARRIAGE OF]

JOHN P. OHL,]

Husband]

and]

LILLIAN M. OHL,]

Wife]

ORDER ASSESSING ATTORNEYS' FEES AND COSTS

THIS CAUSE came on to be heard before the Court upon the application of the wife for attorneys' fees and for the assessment of costs, and the Court having heard evidence and argument of counsel, finds as follows:

1) Wife is entitled to an award

of attorneys' fees in the amount of the reasonable value of her attorneys' services, which the Court herein finds to be the sum of $21,500.00.

2) Wife is entitled to the assessment of her costs to the extent of $5,890.05.

IT IS THEREUPON

ORDER AND ADJUDGED that the Husband, JOHN P. OHL shall pay to the Wife, LILLIAN M. OHL the sum of $21,500 for legal services rendered in this cause to her, and the sum of $5,890.05 as her assessable costs, for a total of $27,390.05, for which let execution issue.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 12th day of September A.D. 1979.

Thomas E. Sholts, Circuit Judge

DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DATED DECEMBER 10, 1980 AFFIRMING THE FINAL JUDGMENT OF DISSOLUTION

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

JULY TERM 1980

LILLIAN M. OHL, Appellant/Cross-Appellee	)	
v.	)	CASE NO. 79-2121
JOHN P. OHL, Appellee/Cross-Appellant.	)	
JOHN P. OHL, Appellant/Cross-Appellee,	)	
v.	)	CASE NO. 79-2143
LILLIAN M. OHL, Appellee/Cross-Appellant.	)	

Decision filed December 10, 1980

Consolidated appeals and cross-appeals from the Circuit Court for Palm Beach County; Thomas E. Sholts, Judge.

H.L. Cooper, Jr., of O'Connell Cooper, Parrish & McBane, P.A., West Palm Beach, for Lillian M. Ohl.

Paxton, Crow, Taplin & Bragg, West Palm Beach, and Edna L. Caruso, West Palm Beach, for John P. Ohl.

PER CURIAM.

AFFIRMED.

LETTS. C.J., BERANEK and HERSEY, JJ., concur.

PETITIONER'S PETITION FOR REHEARING
ADDRESSED TO THE FOURTH DISTRICT
COURT OF APPEAL.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FOURTH DISTRICT

CASE NOS.: 79-2123

79-2143

LILLIAN M. OHL,

Appellant/Cross-Appellee,

v.

JOHN P. OHL,

Appellee/Cross-Appellant.

_____/

PETITION FOR REHEARING
AND PETITION TO CERTIFY QUESTIONS
TO THE FLORIDA SUPREME COURT

JOHN P. OHL, Appellee/Cross-Appellant, files this Petition for Rehearing and Petition to Certify Questions to the Florida Supreme Court and as grounds therefor would show unto the Court as follows:

No Equitable Imbalance

No equitable imbalance will be created if the Court affirms (as it has done) the finding of no alimony by reason of "no need"(1) and yet reverses the finding of a special special equity of 40% in the Husband's New York real property and a 50% in the balance of the Husband's New York personal property by reason of a failure to prove a right thereto either "beyond a reasonable doubt" or by "clear, convincing and unambiguous" evidence. Also reversing the allowance of counsel fees and costs as a consequence of "no need" or shown "inability to pay" will create no equitable imbalance.

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(1) R. 1470 quoted at p. 2 of the Husband's Main Brief.

At the November 25, 1980 argument, members of the panel posed questions to counsel raising the question that if the Court were to affirm the refusal to grant alimony and were to reverse the finding of the Wife's special equity and the granting of counsel fees and costs - would the Court not have to remand the entire matter?

Our answer then and now is NO. As we have pointed out no equitable imbalance will result.

The reason is that the Wife's admission in her parol testimony(2) that for ten years she had had "no need" was predicated upon her sworn financial affidavits and the evidence clearly showed she had financial resources of $2,161,000(3).

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(2) Summarized in Appendix 6 to the Husband's Reply Brief.

(3) P. 12 Husband's Main Brief.

The special equity argument pro and con is whether she shall have $184,000 more[4] for her alleged (but not proved ed) special equity in her Husband's New York real estate and $60,000[5] more (on top of $65,000 already conceded)[6] of her Husband's New York personal property. In short, the Husband's New York assets to the extent of $244,000 have been ordered transferred to his wife so her financial resources will be increased to $2,470,000.

We claim $244,000 more is too much - in any event.

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(4) See Tabulation, p. 12 Husband's Main Brief.

(5) Husband's Main Brief, p. 11 and footnote 9.

(6) Mrs. Ohl's testimony, "You may put that down" (T235): Includes the 225 items conceded to shorten the trial valued at $65,000 but not to be found in the Wife's affidavit, but on cross examination she conceded that the $65,000 amount should be added.

The ordered special equity transfers necessarily reduce the Husband's resources from $1,399,854 to $1,090,854[7].

The real point is that the Wife admitted her net worth was such that she had no need[8]. Under these circumstances neither the Trial Judge nor this Court can properly find a legal basis for taking $244,000 from the Husband and transferring it to the Wife - when she had no need therefor.

The case presented is really one where enough has been admitted to be

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(7) Even if there is to be added ($394,200) Mr. Ohl's future "pension" income (without offsetting future expense) claimed (but vigorously denied) to be added to his assets his net worth would be $1,485,054 as compared with his Wife's resources of $2,470,000, or almost $1,000,000 more! (Appellee's Brief, pp. 9-17).

(8) The Wife's financial affidavits did not include either the real estate nor the personal property so claimed.

enough but ($244,000) more is too much! Therefore, no equitable imbalance will be created if the "more" (special equity items) are not added to the Wife's already sufficient financial resources.

A Lack of Due Process

To date there has been a lack of due process[9] which will result in a gross miscarriage of justice. While the parties cross-appealing have had their "day in Court", the "decisions" handed down are devoid of any reason explaining the result to either party. No rule of law

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(9) Procedural as well as substantive: Even in a community property state (Calif.) In Re Marriage Of Roesch, 83 Cal.App. 96 "when both of these conditions exist [including change of domicile to Calif.] the interest of the State of California in the status of the property is insufficient to justify reclassification without violating the due process clause of the Fourteenth Amendment and the privilege and immunities clause of Article IV, Section 2 of the Federal Constitution."

has been stated to have been applied, nor has one case been cited at either the trial or appellate level to justify the result.

We are all enjoined to live by the rule of law. But what rule? No one can learn in this case what rule of law has been applied to the facts. Prior cases are supposed to have precedential value and the doctrine of stare decises to have force. We are at a loss to know what case or cases are relied on, followed or overruled.

As no opinion has been forthcoming, applying some rule of law to the facts and no precedent (case) is cited how is the litigant's "right to know"(10) sat-

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(10) If under the First Amendment reporters have a right to let the public know (Time, Inc. v. Hill, 385 U.S. 374 [1967]) a fortiori the litigants themselves have a right to know.

isfied? The application of no rule of law, the citation of no case - leaving only the result known (here unsatisfactory to both parties to the cross appeals) has the (unintended) result of arbitrariness[11]. The pronouncement of the ratio dedecendi resolving a case elimminates any appearance of arbitrariness. Moreover, without a written opinion no litigant can seek a review by an application to the Supreme Court of Florida for further enlightenment.

The Courts are required to adjudicate rights by due process of law.

"Accordingly, a most important element of protection afforded by the due process clauses of the State and Federal Constitutions is procedural due process." 10 Fla.Jur.2d 3368 (p. 531).

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(11) Why 40%? Why not 30%, 20% or 10%? There is no rational explanation offered here.

We understand the rule of the law (and the Constitution) requires in special equity cases under the doctrine of stare decises that the claiming party (here the Wife) prove beyond a reasonable doubt that her funds were used to acquire the property (or her 40% or 50% interest therein) whether real or personal property.

We submit, no judicial answer has so far been given.

We submit, that where the Wife states she has "no proof"[12] of special equity that should have ended the matter. However, the trial judge, in spite of a motion to preclued made before the

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(12) See the Wife's testimony extracted in Appendix 4: "A. I have no documents whatsoever." and "No, I do not. I have no proof of any kind."

trial[13] which was not decided but postponed on the Wife's counsel's statement that he would probably not use such evidence anyhow, admitted confidential private documents[14] toward the very end of the trial. Before this Court the Wife's only evidence now urged to support the finding of a special equity below rests on stolen evidence[15].

Even if admissible, the documents properly analyzed do not support the re-

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(13) R.1198-1199.

(14) Article 1, Declaration of Rights, Section 12, Searches and Seizures, Constitution of the State of Florida, 1968, F.S.A., provides in part:

> "The right of the people to be secure in their persons, houses, papers, and effects . . . against the unreasobable interception of private communications, by any means, shall not be violated."

(15) "Yes, I sure did" (R1145). Cf. Wife's Brief, page 31, no evidence only Husband's own testimony. Downright misleading.

sult claimed. No judge has said, whether and if so, how, the stolen documents support taking the Husband's properties always located in New York away from him and turning them over to the Wife.

While no Florida case expressly dealing with a case of stolen documents has been found (and the instant case may be, in this regard, one of first impression) at least two other state Courts have barred the use of such evidence(16). Otherwise, the result is to put a premium on stealing(17).

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(16) Williams v. Williams, 221 N.E. 2d 622 (Ohio, Common Pleas 1966) and in California Kohn v. Superior Court, 12 Cal.App.2d 459, 55 P.2d 1186 (Cal. 1936).

(17) Cf. The Supreme Court opinion in a criminal case: Mapp, 367 U.S. at 655 "Only last year the Court itself recognized that the purpose of the exclusionary rule is to deter -- to compel respect for the Constitutional guaranty in the only effective available way -- by removing the incentive to disregard it. Elkins v. United States, supra, 364 U.S. at p. 217, 80 S.Ct. at p. 144".

There is no way the Wife has proved her special equity claim "beyond a reasonable doubt" - let alone by "clear, convincing and unambiguous" evidence.

Without explanation in the instant case the result here overrules sub-silentio all previous special equity precedents.

Counsel Fees

In the neuter-gender world recently decreed by the U.S. Supreme Court in dealing with payment of attorney fees in matrimonial actions[18], the Florida Statute 61.16 read, as it must be, in a neuter-gender manner, requires, we sub-

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(18) Orr v. Orr, 440 U.S. 268 (1979), holding unconstitutional the Alabama Statute on the Husband being responsible for the Wife's counsel fees and Childs v. Childs, 440 U.S. 952 (1979), holding unconstitutional the New York Statute making the Husband likewise responsible for the Wife's counsel fees.

mit, each spouse to discharge their respective legal costs and expenses if they were financially able to do so. It is unconstitutional to decree otherwise. Here the Wife's worth is upward of two million dollars and her U.S. Income Tax Return for one year alone (1976) shows taxable income of $190,720[19], yet she has been relieved of paying $21,500 of her own fees to her duplicative attorneys and the Husband has been ordered to do so.

The case law and the doctrine of stare decises has been overruled sub-silentio[20]. The illogical result is

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(19) In addition she has so called tax-free income. Pl. Ex. No. 15. Husband's Main Brief p. 7.

(20) The Court's decision here directly conflicts with Turner v. Turner, 383 So.2d 700 (Fla.4th DCA, April 30, 1980), No. 78-2200, wherein this Court held that an award of attorney's fees in a dissolution of marriage could only be made where the Wife had a need.

that the same Statute § 61.16 that governs trial expenses governs appellate expenses. Yet the burden of one is transferred from the Wife to the Husband but the other is not.(21) The rule of law applied to the facts of the instant case constitutionally requires a holding that the Wife discharge her obligation to pay both.

The Court's reversal of the finding of special equity and the order directing the Husband to reimburse the Wife for the counsel fees she has already paid with respect to only proceedings below will create no equitable imbalance and will set straight what otherwise would be a lack of procedural and substantive due process of law.

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(21) This Court's disallowance of an attorney's fees to the Wife on appeal.

Summary of What Has Been Overlooked

The Court's per curiam affirmance in the case of the Husband's appeal (No. 79-2143) has overlooked:

1. In regard to the Husband's New York properties (both real and personal) that there is no basis in the record (under the standard of evidence required to be submitted) to support the award of arbitrary 40% in his New York titled real properties (Sands Point and Parker) nor a 50% interest in the balance of his titled New York personal property.

The claimed special equity has not been proved beyond either reasonable doubt[22] or by clear, convincing and unambiguous evidence. None of the evidence presented by the Wife that she,

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(22) Lindley v. Lindley, 84 So.2d 17 (Fla. 1955).

or her parents, had contributed any monies toward the purchase of the New York properties meets the evidentiary tests. To draw such conclusions, one must engage in speculation and surmise. This type testimony does not rise to the requirement of evidence "beyond a reasonable doubt" nor is it "clear, convincing and unambiguous" evidence.

2. In any event, the only evidence presented to the trial court was documentary evidence stolen from the Husband. At the beginning of the trial, the Wife testified that she had no evidence to prove a special equity. Later in the case her counsel produced stolen documents admitted over objection. While it is the Husband's position that these documents properly construed did not establish a special equity, they should not

have been allowed into evidence[23].

3. Finally, the property in which a special equity was awarded is New York property. This state has no jurisdiction over New York properties. New York is a title state. Under New York Law title to the property is, and always has been, in the Husband's sole name. The Husband's New York Under New York Law title to the property is, and always has been, in the Husband's sole name. The Husband's New York property does not lose its character simply because the Husband moved to Florida. The wife did not move to Florida. The U.S. Constitution decrees that the Husband's New York titled real or personal property cannot be di-

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(23) Williams v. Williams, 221 N.E. 2d 622 (Ohio, Common Pleas, 1966); Kohn v. Superior Court, 12 Cal.App.2d 459, 55 P.2d 1186 (Cal. 1936).

vested upon his moving to Florida[24]. There is no basis in the record for awarding the Wife approximately 75% of the parties' New York personal property. Even in a community property state, the Husband would have been entitled to one-half. Under New York law, where the personal property has been paid for by the Husband[25], the property is his[26].

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(24) In Re Marriage Of Roesch, 147 Cal.Rptr. 586, 83 Ca.App.3d 96 (Cal.App.).

(25) P.Ex.No. 13 shows Mr. Ohl's personal check No. 300 dated May 17, 1952 to the order of the Parke-Bernet Galleries, Inc., for $7,810.75 drawn on the Morgan Guaranty Trust Company of New York and his bank statement shows after payment of this check his balance was $38,725. The identification of the items of personal property in this instance is resolved by the description in the invoice with reference numbers in the catalogue of the La Rouchefoucould collection. Even after 27 years, documentary evidence was produced at the Trial (P. Ex. 13) which is irrefutable (Cf. T. p. 321).

(26) Manheim v. Manheim, 60 Misc.2d 88, 302 N.Y.S.2d 473 (Supp.Ct. Nassau County 1969), aff'd, 310 N.Y.S.2d 1017.

WHEREFORE, the Husband requests this Court to grant a rehearing in this cause by reason of the above factors and to reverse the awarding of a special equity and the order requiring the Husband to reimburse the Wife's counsel fees paid to her trial counsel.

PETITION FOR CERTIFIED QUESTION

Alternatively, the Husband requests this Court to certify the following questions to the Florida Supreme Court as being ones of great public interest:

POINT I

WHETHER CONSTITUTIONAL CONSIDERATIONS REQUIRE THAT IN A DISSOLUTION OF MARRIAGE IN FLORIDA, NEW YORK LAW BE APPLIED TO PROPERTY (REAL AND PERSONAL) LOCATED IN NEW YORK WHERE UNDER NEW YORK LAW THE HUSBAND WOULD BE ENTITLED TO THE PROPERTY, BUT WHERE THE HUSBAND NOW RESIDES IN FLORIDA AND THE WIFE RESIDES IN THE CAYMAN ISLANDS?

POINT II

WHETHER CONSTITUTIONAL CONSIDERATIONS REQUIRE THAT DOCUMENTS WHICH THE WIFE STOLE FROM THE HUSBAND ARE INADMISSIBLE IN EVIDENCE IN A DISSOLUTION OF MARRIAGE ACTION?

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: H. L. COOPER, JR., P. O. Box 3917, West Palm Beach, FL 33402, this 24th day of DECEMBER, 1980.

PAXTON, CROW, TAPLIN & BRAGG
Suite 600-Forum III
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West Palm Beach, FL 33401

and

EDNA L. CARUSO
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1655 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401
305-686-8010
Attorneys for Appellee/Cross-Appellant

By_____for
NORMAN E. TAPLIN

DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DATED JANUARY 16, 1981 DENYING PETITIONER'S PETITION FOR REHEARING.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

LILLIAN M. OHL,

Appellant,

v.

CASE NO. 79-2123 and 79-2143

JOHN P. OHL,

Appellee.

January 16, 1981

BY ORDER OF THE COURT:

ORDERED that Appellee/Cross-Appellant's December 24, 1980 Petition for Rehearing and Petition to Certify Questions to the Florida Supreme Court are hereby denied; and further,

ORDERED that Appellant's December 24, 1980 Motion for Rehearing is hereby denied.

I hereby certify the foregoing is a true copy of the original court order.

CLYDE L. HEATH,
CLERK

cc: O'Connell, Cooper, Parrish & McBane, P.A.
Norman E. Taplin, Esq.
Edna L. Caruso, Esq.

PETITION TO INVOKE DISCRETIONARY JURISDICTION OF FLORIDA SUPREME COURT IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

CASE NO.: 79-2123
79-2143

LILLIAN M. OHL,

Appellant/Cross-Appellee,

v.

JOHN P. OHL,

Appellee/Cross-Appellant.

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS HEREBY GIVEN that JOHN P. OHL, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court dated December 10, 1980, Petitions for Rehearing denied January 16, 1981.

The decision directly and expressly conflicts with decisions of other Dis-

trict Courts of Appeal and of the Supreme Court of Florida which expressly construes Article 1, Sections 2, 9 and 12 of the Constitution of the State of Florida and the IV, V and XIV (Section 1) Amendments to the United States Constitution in a manner which is contrary to decisions of the Supreme Court of the United States in the following respects:

1. Denies Petitioner (Husband) the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States as construed B in Orr v. Orr, 440 U.S. 268 (decided March 5, 1979) (Alabama); Childs v. Childs, 440 U.S. 952 (March 19, 1979) (New York); and Loyacano v. LeBlanc, 440 U.S. 952 (March 19, 1979) (Louisiana) to make it unconstitutional to order the Husband to pay his Wife's counsel fees and her Court costs where the Wife is indisputedly

worth over two million dollars and has been found to have sufficient income for her support by reason the Trial Court's finding the Wife had no need and its denial of alimony to her in any form. 1-B

2. Denies Petitioner due process of law and equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution as construed for example In Re Marriage of Roesch, 147 Cal.Reptr. 586, 83 Cal.App.3d 96 (Cal.App. 1978), to make it unconstitutional to take the Husband's property (real and personal) titled solely in him under the laws of New York where the properties always have been located and where the parties (Husband and Wife) separated in a Florida divorce proceeding wherein the Wife was held not to be entitled to alimony in any form.

3. Denies Petitioner due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and his right to be "secure" in his "papers and effects" against "Seizures" under the Fourth Amendment as construed in Mapp v. Ohio, 367 U.S. 643 (1961) (in a criminal case) but required in civil cases as well, Williams v. Williams, 221 N.E.2d 622 (Common Pleas, 1966) and Kohn v. Superior Court, 12 Cal. App.2d 459, 55 P. 2 1186 (1936); See Elkins v. United States, 364 U.S. at p. 217 particularly as the stolen evidence is the only evidence presented by the Wife in support of her claim to the Husband's New York property, she having orally testified she had no proofs.

4. Denies Petitioner substantive and procedural due process of law rights guaranteed by the Fourteenth Amendment to

the United States Constitution C in that the Trial and Appellate Courts have failed to specify any ground or reason for their Order requiring the Husband to turn over his New York properties to the Wife, thus unconstitutionally taking his properties in an arbitrary manner.

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: Larry Cooper, Esquire, Post Office Box 3917, West Palm Beach, Florida, 33402, this 16th day of February, 1981.

PAXTON, CROW, TAPLIN & BRAGG, P.A.
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Suite 600
West Palm Beach, Florida 33401
Telephone: 305-684-2121

and

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1655 Palm Beach Lakes Boulevard
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Telephone: 305-686-8010

Attorneys for JOHN P. OHL

BY: _____
NORMAN E. TAPLIN

DECISION OF FLORIDA SUPREME COURT RULING THAT IT HAS NO JURISDICTION TO REVIEW THE FOURTH DISTRICT COURT OF APPEAL'S DECISION

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, FEBRUARY 25, 1981

JOHN P. OHL,	**	
Petitioner,	**	CASE NO. 60,288
vs.	**	District Court of Appeal, 4th District - Nos. 79-2123 & 79-2143
LILLIAN M. OHL,	**	
Respondent.	**	

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy C

TEST:

cc: Hon. Clyde L. Heath,
Clerk
Hon. John B. Dunkle,
Clerk
Hon. Thomas E. Sholts,
Judge

Norman E. Taplin, Esquire of
Paxton, Crow, Taplin & Bragg
Edna L. Caruso, Esquire
Larry Cooper, Esquire

Sid J. White
Clerk Supreme Court

By: /s/ Debbie Causseaux
Deputy Clerk

Statutory Appendix

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UNITED STATES CONSTITUTION, ARTICLE FOUR, SECTION TWO:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states.

UNITED STATES CONSTITUTION, FOURTH AMENDMENT:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, SECTION 1:

All persons born or naturalized in

the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA STATUTES ANNOTATED, SECTION 61.16:

The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings.

The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

Office-Supreme Court, U.S.
FILED
JUN 1 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1733

in the

Supreme Court

of the

United States

OCTOBER TERM 1980

JOHN P. OHL,

Petitioner

vs.

LILLIAN M. OHL,

Respondent

On Petition for Writ of Certiorari
to the Fourth District Court of Appeals
of Florida

RESPONDENT'S BRIEF IN OPPOSITION

BRUCE W. PARRISH, JR.
Attorney for Respondent,
LILLIAN M. OHL
501 South Flagler Drive
Flagler Center
West Palm Beach, FL 33402

QUESTIONS

1. SHOULD CERTIORARI BE GRANTED WHERE THE RESPONDENT (WIFE) WAS GRANTED A SPECIAL EQUITY IN REAL PROPERTY AND JOINT OWNERSHIP OF PERSONAL PROPERTY ALLEGEDLY TITLED IN THE NAME OF THE PETITIONER (HUSBAND) AND SITUATED IN NEW YORK, A STATE FROM WHICH BOTH PARTIES HAD REMOVED THEIR RESIDENCE, WHEN BOTH PARTIES HAD SUBMITTED THEMSELVES TO THE JURISDICTION OF AND SOUGHT AFFIRMATIVE RELIEF IN THE FLORIDA COURTS AND WHERE THE PETITIONER (HUSBAND) FAILED PROPERLY TO RAISE IN THE STATE COURTS THE FEDERAL CONSTITUTIONAL ISSUE UPON WHICH HE RELIES FOR JURISDICTION?

2. WHERE PETITIONER (HUSBAND) HAD FAILED TO DEMONSTRATE THE ABSENCE OF ADEQUATE STATE GROUNDS UPON WHICH A DECISION AWARDING ATTORNEYS' FEES TO THE RESPONDENT (WIFE) WAS MADE, MAY HE OBTAIN REVIEW OF THE AWARD BY THIS COURT?

3. MAY PETITIONER (HUSBAND) OBTAIN REVIEW BY THIS COURT OF A TRIAL COURT RULING ADMITTING INTO EVIDENCE DOCUMENTS WHICH WERE STORED IN THE MARITAL HOME ACCESSIBLE TO THE WIFE AND CHILDREN BUT ALLEGEDLY "STOLEN" FROM HIM, EVEN THOUGH HE MADE NO PROPER OBJECTION TO THEIR ADMISSIBILITY AT THE TIME OF TRIAL?

4. SHOULD THE UNITED STATES SUPREME COURT GRANT CERTIORARI WHERE A JUDGMENT OF DISSOLUTION OF MARRIAGE DOES NOT B ITS OWN TERMS RULE UPON ANY FEDERAL QUESTION, WHERE THE JUDGMENT IS AFFIRMED WITHOUT OPINION BY THE FLORIDA DISTRICT COURT OF APPEAL AND WHERE THE FLORIDA SUPREME COURT FINDS ITSELF WITHOUT JURISDICTION TO REVIEW THE JUDGMENT?

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FLORIDA PROCEDURAL RULES

Appellant cites Rules 1.110(d) and 1.140(h), Florida Rules of Civil Procedure. They are reproduced in an Appendix at the back of the volume.

STATEMENT OF THE CASE

The Petitioner (Husband) and Respondent (Wife) were married in 1932 and lived in New York City while the Husband completed his studies at Columbia University Law School, and for approximately one year thereafter, at which time he accepted an appointment to go to Washington, D.C. where he was engaged in the drafting of the Internal Revenue Code of 1934. Upon completion of that assignment the parties returned to and lived in the New York area, except for a time during World War II. In 1950 the marital residence at Sands Point, Long Island, New York, was purchased and title taken by him in Husband's name "for tax reasons", even though the Wife and her family had made specific monetary contributions from sources outside the marriage to the previous marital residence and to the Sands Point property itself.

Approximately three (3) years prior to the trial, the Wife acquired a three-bedroom, two-bath home in the Cayman Islands and commenced spending part of each winter in that location. The parties and their daughter, KERIN, were partners in a ranch in Wyoming and the Wife spent a portion of each summer at the ranch. She continued to stay in the marital home and continued to use it freely as her own up until the actual

trial of this case. The Husband continued to carry the expenses of the marital home at Sands Point up until the time of trial and to that extent did provide the Wife with a degree of support. The Sands Point house was a large mansion situated upon approximately ten acres and required three to four full time staff members.

The evidence showed that the Wife had an after-tax net worth of approximately $1,000,000, whereas the Husband's after-tax net worth was in excess of $1,400,000, plus the value of his beneficial interest in a certain trust situated in Bermuda, the magnitude of which was totally undisclosed at trial.

The evidence was that at the time of trial the Wife's annual income was estimated at $78,000 before taxes, whereas the cash available to the Husband during the year prior to trial, for investment and living expenses, amounted to $222,000. Though the Husband had retired from active participation in his New York law firm, he had still earned legal fees in excess of $100,000, plus pension benefits being paid to him by the law firm at an annual rate of $67,000, plus income from securities, director's fees, trustee's fees, and tax benefits from partnership investments.

The Wife concededly purchased a group of items of personal property with her own separate funds. As to the balance of the personal property contained in the inventory of the Sands Point residence, the Court found that it was jointly owned. The Husband claims in his Petition that the Wife acknowledged she had not contributed any monies toward the purchase of those items. That contention was disputed. There is another

very definite distinction to be drawn, in that essentially all of the Wife's funds originated from sources outside the marriage. The Husband on the other hand was and is a very successful tax lawyer, investor and businessman, and had virtually no funds other than those acquired from those endeavors during the course of the marriage. The Wife, under Florida law, is considered to have made a contribution toward the accumulation of those funds by virtue of staying home, raising the children, taking care of the home, entertaining clients, maintaining a social standing in the community and all of those things which contribute to the enhancement of the ability of the other spouse to earn money and achieve financial progress. *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980) at 1203 and 1204.

Certain documents having reference to the administration of the Respondent's father's estate, the title transactions with respect to the Sands Point house, and the previous marital residence of the parties were received into evidence over the contention of the Petitioner that they were "stolen" documents. These documents were stored in the marital home accessible not only to the Husband but also the Wife and children of the parties. No constitutional objection was made to the receipt of those documents into evidence in the Petitioner's Motion in Limine (2a) directed to the admissibility of those documents, and such objection as was made at trial was not on any legally sufficient ground. (10 & 11a) There is no question the documents were discoverable and were otherwise competent and relevant evidence.

ARGUMENT

(1) The Petitioner relies heavily upon the California case of *In Re: Marriage of Roesch*, 83 Cal.App.3d 96, 147 Cal.Rptr. 586, (1st Dist. 1978) and upon the New York case of *Scheurer v. Scheurer*, 308 N.Y. 447, 126 N.E.2d 555 (1955). In the *Roesch* case the California court held that California's quasi-community property law could constitutionally be applied to out-of-state property in cases where both parties, having previously been domiciled in another state, had changed their domicile to California and, subsequent to the change of domicile, the spouses sought in a California court legal alteration of their marital status. In that case the parties had previously resided in Pennsylvania where the husband acquired an interest in a parcel of real estate in his name alone. The husband then moved to California where he brought suit for divorce. The wife and minor child of the parties, remained in Pennsylvania. The court held that under those facts the interest of California in the marital property was minimal, whereas that of Pennsylvania was substantial and that the wife was entitled to protection of the laws of Pennsylvania.

In this case the wife, of course, did not remain a resident of New York and in addition to that she, along with her husband, sought affirmative relief with reference to the marriage in the courts of Florida. It makes little difference, and certainly would add nothing to the constitutional validity of the Petitioner's claims here, whether or not the wife established residence in Florida, in Wyoming or in the Cayman Islands. The key factors are that she is no longer a resident of New York and that she did seek affirmative relief in the courts of

Florida, thereby submitting herself to the jurisdiction of the Florida courts and making herself amenable to the jurisprudence of the State of Florida which holds that one spouse may acquire a special equity in property acquired and titled in the name of the other spouse provided there is evidence the first spouse contributed to the acquisition of the property from sources outside the marriage. *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980), *Duncan v. Duncan*, 379 So.2d 949 (Fla. 1980).

The Petitioner relied upon the New York case of *Scheurer v. Scheurer, supra*, to support his contention that any rights the wife had to the New York property titled in his name were barred. In that case the Plaintiff/Wife sought to impress a constructive trust in her favor on a house purchased by the husband in his own name claiming that it was paid for in part with her money. This was denied and the husband pled as defenses the Statute of Frauds and the Statute of Limitations. The Court of Appeals held that the claim was barred by the Statute of Limitations and the running of the statute was not tolled merely because the parties were husband and wife.

Under Florida law the Statute of Limitations is an affirmative defense, Fla.R.Civ.Proc. 1.110(d), and if not pled and proved is waived. Fla.R.Civ.Proc. 1.140(h). The Petitioner in this case neither pled the Statute of Limitations, nor proved at the trial that the Respondent had no right of action under New York law. Neither did the Respondent argue in his briefs to the trial court that he would be denied due process or equal protection of the law under the United States Constitution in the event the relief Petitioner sought was granted to her.

The Respondent in her Counterclaim, by her evidence at trial, and in her post trial briefs always sought a special equity in the New York real estate and a share of the personal property which was acquired by the parties during the course of the marriage for use in the marital home. It was incumbent upon Petitioner to make his defenses and his objections based on New York law and based upon any alleged constitutional grounds in the trial court and not for the first time in the appellate courts. *Herndon v. State of Georgia*, 295 U.S. 441, 443, (1935) reh. denied 296 U.S. 661 (1935).

(2) The Petitioner makes no assault upon the Florida Statute providing for the award of attorneys' fees and concedes that the statute of Florida is gender neutral, unlike the statutes which are construed in the cases cited in his brief. He argues that since the Florida trial court found the wife had no "need" for the purpose of an award of alimony, that meant that she was not entitled to her attorneys' fees either. The terms of the statute clearly give the trial court discretion mandating only that it consider "the financial resources of both parties" and that the amount for attorneys' fees and suit money be "reasonable". The evidence in the instant case would have supported a finding that the net worth of the Petitioner was significantly greater than the net worth of the Respondent, although the trial court made no finding of fact as to the relative net worths of the parties. In addition, the award clearly was supported by the evidence of the relative incomes of the parties, a purely factual determination, and totally unrelated to considerations of sex.

(3) Contained in the appendix to this brief are pages from the transcript of the trial along with a

portion of the Motion in Limine filed by the Petitioner in advance of the trial. From the transcript it can readily be seen that in some instances the documents were admitted without objection. (8a, 9a & 12a) With respect to Respondent's Exhibit No. 23 the Petitioner grounded his objection on the Florida Supreme Court case of *Markham v. Markham*, 272 So.2d 813 (Fla. 1973), a wiretap case decided on the basis of Florida Statute 934.01(4) and the Florida Constitution. A careful review of the Florida Supreme Court decision in the *Markham* case and of the decision of the Florida District Court of Appeal, First District, at 265 So.2d 59 (Fla. 1st DCA 1972), reveal no reference to, nor reliance upon, the United States Constitution. Both decisions are grounded entirely upon Florida law and, in fact, the District Court of Appeal cited the case of *Katz v. United States*, 389 U.S. 347 (1967), for the proposition:

> " . . . but the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and his very life, left largely to the law of the individual states."

The Respondent's objection, grounded upon the *Markham* case, was that the evidence was a result or product of a wrongful act of the Respondent. The trial court never made the determination, which would initially have been a factual determination to be made by the trial court, as to whether the subject document was indeed a product of a wrongful act of the Respondent, since the trial court ruled that the *Markham* case was not applicable to the facts in the present case. The *Markham* case involved the question of whether wiretap

evidence offered by a husband from a tap of his own telephone line should be admissible against the Wife. The Florida statute prohibited wiretapping but did not make any exception for husbands tapping their own lines. In the present case there was no statute, and the attention of the trial court was not directed to any provision of the United States Constitution, nor was that of the District Court of Appeal, until the filing of the Petition for Rehearing, and then only by virtue of a footnote reference to *Mapp v. Ohio*, 367 U.S. 643 (1961).

(4) A review of Petitioner's Petition for Writ of Certiorari and Appendix thereto clearly shows the following facts:

(1) No ruling was made upon any Federal question in the trial court's Final Judgment of Dissolution of Marriage, nor in that court's Order Assessing Attorneys' Fees and Costs;

(2) The Judgment and Order of the trial court were affirmed without opinion by the Fourth District Court of Appeal of Florida;

(3) Petitioner fails to show that he presented any Federal Constitutional issues to the District Court of Appeal prior to his Petition for Rehearing;

(4) No Federal issues were expressly decided by the Florida District Court of Appeal; and

(5) The Florida Supreme Court expressly found itself without jurisdiction to entertain Petitioner's Petition inasmuch as the Fourth District Court of Appeal of Florida had written no opinion.

It is well settled that the burden is on the Petitioner to establish the jurisdiction of the United States Supreme Court in his Petition for Writ of Certiorari. *Durley v. Mayo*, 351 U.S. 277 (1956), reh. denied 352 U.S. 859(1957). The rule of law has been aptly stated in *Mellon v. O'Neil*, 275 U.S. 212 (1927):

> "It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. *Whitney v. California*, 274 U.S. 357; and cases cited. It is not enough that there may be somewhere hidden in the record a question which if it had been raised would have been of a federal nature (citations)."

This court has considered the question of acquiring jurisdiction in the absence of written opinions by the state courts on several occasions in the past. For instance in *Cuyahoga River Power Company v. Northern Realty Company*, 244 U.S. 300 (1917), the trial court refused to condemn a certain tract of land. Appeal was taken to the Ohio Court of Appeals which affirmed without opinion. The Ohio Supreme Court refused to accept jurisdiction. A writ of error was requested to the Ohio Court of Appeals. The Supreme Court refused to accept jurisdiction because:

> "from an absence of an opinion expressed by the court below it is impossible to say whether

its judgment was rested upon state questions adequate to sustain it independent of the federal questions, or upon such federal questions, both being in the case." 244 U.S. at 304.

Another case involving the lack of a written opinion was *Durley v. Mayo, supra.* In that case Petitioner's Application for Writ of Certiorari was granted but the case was later dismissed where the State of Florida presented evidence that the opinion rested upon State grounds. The Supreme Court stated:

> "In the face of these expressions of the law of Florida, petitioner, in order to establish our jurisdiction, must demonstrate that neither of these state grounds can account for the decision below. 'Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment.' *Stembridge v. State of Georgia*, 343 U.S. 541, 547, 72 S.Ct. 834, 837, 96 L.Ed. 1130.
>
> " 'It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause . . .' " 351 U.S. at 281.

The "barrenness of the record" was cited as the reason for declining to exercise jurisdiction in *DeBacker v. Brainard*, 396 U.S. 28 (1969). In that case Petitioner, a juvenile, claimed that due process was denied him when a Nebraska prosecutor exercised his unreviewable discretion to proceed against this juvenile in ordinary criminal proceedings, rather than in Juvenile Court. In that case the record shows that Petitioner did not make this due process contention before the Juvenile Court Judge. He raised this in a habeas corpus petition but it was not passed upon by the Nebraska District Court. Petitioner failed to press this issue in his appeal to the Nebraska Supreme Court and made only passing reference to it in his brief to that court. Finally, the opinions of the Nebraska Supreme Court did not pass upon the issue nor even refer to it.

In Petitioner's Petition for Rehearing addressed to the Fourth District Court of Appeal of Florida, Petitioner made mention of several "constitutional" issues relating to the Judgment of Dissolution of Marriage entered by the trial court. This was not enough to raise a federal constitutional issue before that court, however, in light of the Supreme Court's holding in *Hiawassee River Power Company v. Carolina-Tennessee Power Company*, 252 U.S. 341 (1920). In that case reference to the "Bill of Rights and the Constitution" was presumed to refer to the State Constitution rather than to the Federal Constitution. Of further significance in the *Hiawassee* case is the fact that the Fourteenth Amendment was actually mentioned in the trial court, although no ruling was made upon it. Furthermore,

> "the long established general rule is that the attempt to raise a federal question after judgment upon a Petition for Rehearing, comes too late, unless the court actually entertains the question and decides it." *Herndon v. State of Georgia*, 295 U.S. 441, 443 (1935), reh. denied 296 U.S. 661(1935).

The *Herndon* case, supra, also points up the fact that the Supreme Court will take cognizance of State procedural rules regarding preservation of points for appeal. In that case there was a preliminary constitutional attack upon the indictment in the trial court; however, this attack was not preserved by exceptions, nor was it assigned as error in due time as the state rules of practice required. Therefore, the Georgia Supreme Court declined to rule on any of these issues, and the U.S. Supreme Court deemed this determination of the Georgia Supreme Court to be conclusive.

Petitioner places a great deal of reliance upon the recent case of *Orr v. Orr*, 440 U.S. 268 (1979), which declared unconstitutional the Alabama Statutes providing that husbands but not wives may be required to pay alimony upon divorce. In that case the Supreme Court exercised its certiorari jurisdiction even though no federal constitutional question was ever raised before or at the time of the divorce decree; however, the husband did manage to raise the constitutional question in the trial court when his wife attempted to seek a contempt citation against him. Furthermore, since no one ever objected to its untimeliness, and since both the trial and the appellate courts decided this issue on the merits, the Supreme Court was able to take certiorari

jurisdiction. Furthermore, the husband in that case relied solely upon the federal constitutional claim in his appeal. It should also be remembered that in the instant case Petitioner is not objecting to the Florida Dissolution of Marriage statute per se but merely to the trial court's application of said statute.

Even if Petitioner had properly presented a federal question to the courts of the State of Florida, the Supreme Court still should not exercise its certiorari jurisdiction in this case. This is because the decision in this case was made entirely in accordance with the Florida Dissolution of Marriage statutes applied in accordance with the provisions of the Florida Constitution.

> "If the judgment below rested on an independent and adequate state ground, the Writ of Certiorari should be dismissed as improvidently granted, *Wilson v. Loew's, Incorporated*, 355 U.S. 597 (1958), for our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights and our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws our review could amount to nothing more than an advisory opinion." *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 566 (1977).

CONCLUSION

In light of the foregoing, it is respectfully submitted that Petitioner has failed to carry his burden of establishing the Certiorari jurisdiction of the Supreme Court. His record does not show that any federal question was ever properly presented in the courts of the State of Florida. It does not show that any state court ever decided, or even considered, any question of a federal nature. Finally, it fails to demonstrate that such a decision was essential to the determination of this cause. Given these circumstances, the instant case is not a proper vehicle for the consideration of the issues the Petitioner would have this Court address.

Respectfully submitted,

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APPENDIX

Excerpts from Petitioner's Motion in Limine. 2a

Rule 1.110(d), Fla. Rules of Civ. Proc. 2a

Rule 1.140(h), Fla. Rules of Civ. Proc. 3a

Excerpts from Transcript of Testimony of John P. Ohl 3a

CONCLUDING PARAGRAPHS OF PETITIONER'S MOTION IN LIMINE SERVED MARCH 29, 1979:

"5. In accordance with case authority, the Respondent should not be permitted to introduce into evidence any of the docments which she took without the knowledge or consent of the Petitioner and which belong to the Petitioner in that such documentation was obtained improperly and unlawfully.

WHEREFORE, the Petitioner, JOHN P. OHL, respectfully moves this Court for an Order in Limine prohibiting the Respondent from introducing into evidence those files taken improperly and unlawfully by the Respondent without the Petitioner's permission or knowledge."

RULE 1.110(d), FLA. RULES OF CIV. PROC.:

(d) **Affirmative Defenses.** In pleading to a preceding pleading a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms if justice so requires, shall treat the pleading as if there had been a proper designation. Affirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion or defense under Rule 1.140(b); provided this

shall not limit amendments under Rule 1.190 even if such ground is sustained.

RULE 1.140(h), FLA. RULES OF CIV. PROC.:

(h) Waiver of Defenses.

(1) A party waives all defenses and objections that he does not present either by motion under subdivisions (b), (e) or (f) of this rule or, if he has made no motion, in his responsive pleading except as provided in subdivision (h)(2).

(2) The defenses of failure to state a cause of action or a legal defense or to join an indispensable party may be raised by motion for judgment on the pleadings or at the trial on the merits in addition to being raised in either a motion under subdivision (b) or in the answer or reply. The defense of lack of jurisdiction of the subject matter may be raised at any time.

EXCERPTS FROM TESTIMONY OF JOHN P. OHL:

[190] BY MR. WEIDENBENNER:

Q. Mr. Ohl, we served, prior to today, we served a notice on your attorneys to produce at trial certain files of yours, to wit, file named J. P. Ohl Personal House, and a file named John P. Ohl Sands Point Property.

Have you brought those files with you?

A. Yes.

Q. May I ask you to compare this document to your files and see if that is similar to a copy in your files?

MR. BRAGG: Is that one of the files that Mrs. Ohl took from Mr. Ohl's files in the Sands Point home?

MR. WEIDENBENNER: Yes. It's from one of those files.

[191] THE WITNESS: Is that the file you are referring to?

MR. WEIDENBENNER: I don't know.

THE WITNESS: Well, you gave it to me.

MR. BRAGG: Your Honor, the hearing we had prior to trial, certain documents the Respondent requested that we produce, we wouldn't produce them, and subsequent discovery revealed that prior to trial, in some days prior to the filing of this lawsuit, Mrs. Ohl had taken files out of Mr. Ohl's files from the Sands Point home.

There was a question—or not—well, anyway, that is my objection or explanation.

THE WITNESS: Well, there's—what was handed to me is a Xerox. There appears to be a ribbon copy in my files. I say my files. And I would have no doubt that the contents was prepared by an associate of mine, Francis A. Fullam, Jr., and delivered to me.

It has to do with the closing of the title on Number 10 Birch Hill Road. It appears in the file which was stolen from me and delivered to me after the subpoenas to produce the information, which you already had in your possession.

MR. WEIDENBENNER: Your Honor, I would like to submit that as Respondent's next Exhibit.

MR. BRAGG: I would object on the grounds the document, the proper predicate has not been laid to [192] introduce that document into evidence. And because of the fact that it came from a file of Mr. Ohl's that was taken by Mrs. Ohl from Mr. Ohl, and pursuant to the case of Markham vs. Markham, 272 2d 813, I believe that the evidence, document is not admissible. It is a result of a wrongful act of the respondent. It's a product of the wrongful act of the respondent and, therefore, regardless of what the document says or purports to say, is inadmissible.

THE COURT: What is that?

MR. BRAGG: 272 So2d 813. That involved a situation in a domestic case where the husband—

THE COURT: Is that the wiretap?

MR. BRAGG: Yes, sir.

THE COURT: I am familiar with that case. I don't think that is applicable to the facts here.

I thought you had something new that you were going to tell me.

I have read the document over and it indicates that he was present at the time of the closing and it's a report of the closing of the Birch Hill property. I think it's relevant and material.

I don't think the Court could sustain the objection. It did come from the file, whether it was taken surreptitiously from his home at Sands Point or not. [193] He got it back. I think it may be relevant, so I will overrule the objection.

MR. WEIDENBENNER: I will add, it was taken from the marital residence.

I further move to strike Mr. Ohl's last statement as to—

THE COURT: I can understand somewhat his consternation at being subpoenaed to produce something when she already had them. It is not truly unusual in a domestic case, but I will strike it from the record because I didn't intend to consider that portion of his answer anyway, so let's proceed.

This will be Respondent's Exhibit 23.

(Thereupon, the document referred to was marked and received Respondent's Exhibit Number 23 in evidence.)

[200] THE COURT: Any objection?

MR. BRAGG: Your Honor, I don't think they are relevant or material to anything.

Assuming they are, that is thirty, twenty, twenty-five, thirty, thirty-five years ago. If there is any relevance today to any of the issues that we have in this particular lawsuit—

THE COURT: It may go to show the relationship between the parties and the relationship between Mr. Ohl and his wife's parents.

There is a check in there that may bear on the money put—

MR. WEIDENBENNER: Purchase of the residence.

THE COURT: That may bear on the down payment for the purchase of the Birch Hill home, so I will overrule it.

Exhibit 3 is now received in evidence over objection as Respondent's Exhibit 3.

(Thereupon, the documents referred to were received Respondent's Exhibit Number 3 in evidence.)

THE COURT: All right. Let's proceed.

[201] Q. And did virtually all the proceeds from the sale of that house go into the Sands Point home?

A. That is correct.

Q. Can you identify that document for me?

A. Well, again, this is a Xerox of a document not signed and the typed signature of Ralph O. Winger, who worked for me, is now a partner, or was, of mine.

I don't want to create problems, but I would like to know where it comes from because I can't identify it. It's a Xerox copy, it's not an original.

Q. Do you have your file there that we requested to produce, that you can compare it to your file?

A. I have whatever you gave me. And undoubtedly if you have these, you can help me by finding it, if it's here.

Q. There is another file, it may be in the Sands Point file, too.

A. I don't want to take up too much time. If you can let me just glance through it, I will tell you whether the substance of it is right, because I have enough recollection of buying and selling this. This is the sale of it. It's not dated. This is what is throwing me.

Do you know—it's not dated. I'm guessing it's in December. 1950. It says, 10:15 a.m. But I don't have a date.

But I would say yes, the substance is accurate. I [202] have no objection to it.

MR. WEIDENBENNER: I would like to have that admitted as Respondent's next Exhibit.

MR. BRAGG: No objection.

THE COURT: Receive it without objection as Respondent's Exhibit 24.

(Thereupon, the document referred to was marked and received Respondent's Exhibit Number 24 in evidence.)

BY MR. WEIDENBENNER:

Q. Mr. Ohl, there are three documents here, all relating to the purchase of the Sands Point property.

I would like to see if you can identify those for me.

A. Yes, I can identify the first one, which is dated October 4, 1950, which I spend a lot of time trying to find and couldn't find because it was in a file that was stolen. I can identify it now, having been put before me.

The contract, the assignment of the contract of sale on the 10 Brich Hill Road is a Xerox copy, and my signature, and I can identify that as a copy.

The third document is a memorandum of closing date, October 17, 1950. I am recorded as present. It's a Xerox copy, again typed signature of Ralph O. Winger, not an original, but I am willing to say it's accurate.

[203] MR. WEIDENBENNER: I would like to have these admitted as Respondent's next Exhibit.

MR. BRAGG: No objection.

THE COURT: I will receive that as Respondent's Exhibit 25 without objection.

(Thereupon, the documents referred to were marked and received Respondent's Exhibit Number 25 in evidence.)

THE COURT: Do you want these as a composite?

MR. WEIDENBENNER: Yes, sir.

THE COURT: All three documents. All right.

MR. WEIDENBENNER: They all relate to the purchase of the Sands Point property.

[207] indicates to me that I was making a calculation of things to be — what their value was and what the tax burden would be if they were sold.

And I have a number at the bottom showing the burden of $5,000 of taxes, so I don't think it would have — it is not dated, so I can't tell you what relevance it has to dates.

And the second one, however, is in my handwriting and would be in round numbers, because it corroborates what is in my black book, were it possible for me to come up with money to buy this.

Q. With the words "value, profit and tax" shown clearly on the top of that document, does it clearly conform with this document?

A. Yes. But it has no date.

MR. WEIDENBENNER: Your Honor, now I will offer these.

THE COURT: You have seen them?

MR. BRAGG: Yes. I object on the ground of relevancy and materiality. I don't know what they are. Are they work papers or whatever? I don't think they have any relevancy or materiality.

MR. WEIDENBENNER: He already testified it was his papers where he was trying to figure out where he could come up with the funds.

[208] THE COURT: There is a reference here that says, house, 10 Birch Hill. I think it's relevant. I will overrule the objection.

Do you want this as a single Exhibit?

MR. WEIDENBENNER: Yes. That can go as a single Exhibit.

THE COURT: That will be Exhibit 26, over objection.

(Thereupon, the document referred to was marked and received Respondent's Exhibit Number 26 in evidence.)

[246] A. I am not referring. It was stolen from my house and I have no way of knowing, without the minute book. It's been taken. It is not signed by me. It's a typewritten Xerox copy from the contents. I believe it to be accurate.

MR. WEIDENBENNER: I would like to have this admitted into evidence.

MR. BRAGG: I don't have objection.

THE COURT: Respondent's Exhibit 32 received without objection.

(Thereupon, the document referred to was marked and received Respondent's Exhibit Number 32 in evidence.)

BY MR. WEIDENBENNER:

Q. Mr. Ohl, these items of personal property which are shown on the appraisal, would it be correct to say that those items were acquired during the course of your marriage?

A. Since we were married in '32 and the date of that, to date we are not divorced, the answer is yes.